Supreme Court, U.S.
FILED

03 . 27 JUN 30 2003

No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

VASKEN TATARIAN,

Petitioner,

v.

WILLIAM G. SWEENEY, VICTOR J. KALETA, AND CITY OF ANAHEIM,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED

1. Does the holding of this Court in Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979), that the doctrines of res judicata and collateral estoppel bar subsequent litigation involving the same issues, apply to constitutional challenges based upon the First Amendment to particular provisions of a municipal code which were not expressly challenged in a prior lawsuit?

2. Should res judicata apply to deprive the owner of an adult entertainment business of the right to assert constitutional defenses to an adult business license requirement - the constitutionality of which he never previously specifically litigated or challenged - because in a prior suit, he unsuccessfully made a general assertion of the facial invalidity of the City's entire 16 page ordinance regulating adult businesses?

3. Where a circuit Court of Appeals issues a major opinion (e.g. Baby Tam v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) establishing that most municipal ordinances imposing license requirements on adult entertainment businesses are facially invalid prior restraints of expression, and such decision issues after finality of a civil rights lawsuit asserting a broad - but unsuccessful facial challenge to a 16 page municipal ordinance regulating adult entertainment businesses, does the annunciation of such a controlling change in the case law constitute an exception to the doctrine of res judicata which would therefore allow a second more narrow suit to proceed, challenging the unconstitutionality of the adult business license requirement based upon the new decision?

PARTIES TO THE PROCEEDINGS

Petitioner

Vasken Tatarian is the owner of the Flamingo Adult Theater in Anaheim, California.

Respondents

William G. Sweeney is the license collector of the City of Anaheim. Victor J. Kaleta is the hearing officer for the City of Anaheim. The City of Anaheim is a municipal corporation existing under the laws of the State of California.

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99 S. Ct. 970 (1979) . . . . . i, 6, 7, 8, 12

Vasken Tatarian, doing business as the Flamingo Theater, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on January 30, 2003. On April 3, 2003 the Ninth Circuit denied a Petition for Rehearing and Rehearing En Banc.

OPINIONS BELOW

The order of the Ninth Circuit Court of Appeals denying the Petition for Rehearing and Rehearing En Banc filed April 3, 2003 is reprinted in Appendix A hereto ("App. A") at page 1a. The Memorandum Opinion and Judgment of the Ninth Circuit Court of Appeals filed January 30, 2003 are reprinted in Appendix B hereto ("App. B") at page 2a. The judgment of the District Court is Appendix C hereto ("App.C") at page 3a.

JURISDICTION

This Court has certiorari jurisdiction by virtue of Title 28, United States Code, Section 1254. Rule 13 (3) of this Court's Rules provides that this Petition may be filed within 90 days of the date the Ninth Circuit denied the Petition for Rehearing. The Ninth Circuit denied a timely Petition for Rehearing on April 3, 2003.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

The First Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Article III, Section 1 of the United States Constitution provides, in part, as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time-to-time ordain and establish. . . ."

Article III, Section 2 of the United States Constitution provides, in part, as follows:

> " The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . ."

STATEMENT OF THE CASE

On September 29, 1994 the City of Anaheim issued to Petitioner a permit to allow him to operate a theater wherein he would present strip tease type dancing recognized by this Court as being protected the First Amendment, City of Erie v. Pap's A.M., 529 U.S. 277, 146 L.Ed.2d 265, 120 S.Ct. 1382 (2000) and Barnes v. Glen Theater, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991). At the time the Anaheim Angels had not yet won the World Series nor had the Anaheim Mighty Ducks reached the seventh game of the Stanley Cup finals.

In 1996 Petitioner brought a civil rights lawsuit against the City of Anaheim (Tatarian v. City of Anaheim, C.D.Cal. No. SA CV - 96-280 GLT in which he challenged the facial validity of three distinct aspects of the City's comprehensive scheme for the regulation of adult businesses, all of which were contained in Chapter 18.89 of the Anaheim Municipal Code. Although certain portions of the complaint were broadly drafted to erroneously suggest that the object of the lawsuit was a challenge to the entirety of Chapter 18.89 (a chapter involving many scores of paragraphs of distinct and unrelated ordinance provisions and restrictions), it is clear upon reading the entire complaint that this first lawsuit only challenged three distinct portions of Chapter 18.89: (1) the provisions which authorized city officials to conduct unscheduled inspections of adult businesses; (2) the provision which imposed hours of operations restrictions on adult businesses; and (3) the former provisions prohibiting adult business from making even minor internal physical changes in their structure not reflected in their previously submitted floor plan. On November 3, 1997 District Judge Gary L. Taylor granted the City's motion for summary judgment with respect to the three provisions described above.

On August 13, 1998 of the following year, City license collector William G. Sweeney ("Sweeney") sent Petitioner a letter informing him of his decision to revoke the permit based upon the alleged violations of certain provisions of the Anaheim Municipal Code, none of which had been challenged in the first federal lawsuit. Respondent Victor J. Kaleta ("Kaleta") conducted administrative hearings which culminated in a final administrative order issued on January 14, 1999 revoking Petitioner's permit and denying his application for the renewal of his prior permit. In response Petitioner filed a second civil rights lawsuit against the City of Anaheim, Tatarian v. City of Anaheim, C.D. Cal. No. SA

CV-99-605 (AHS), the instant lawsuit. In this second lawsuit, which is the subject of this Petition for Writ of Certiorari, Petitioner combined a number of civil rights claims seeking prospective declaratory and injunctive relief. Administrative Mandamus was also sought to challenge the permit revocation order. Up until this point Petitioner had always possessed the required permit and had never filed any challenge in any court or administrative proceeding attacking the constitutionality of the permit requirement. Nor had Petitioner ever asserted the unconstitutionality of the City's permit revocation proceedings. He presented such claims, for the first time, in his second federal lawsuit along with a variety of other claims for declaratory and injunctive relief.

One of the major legal contentions in the second federal lawsuit was based upon the recent decision of the Ninth Circuit Court of Appeals in Baby Tam & Co., Inc v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998), which held that licensing requirements for adult entertainment businesses were facially unconstitutional under the First Amendment if they failed to guarantee that any judicial review of the license denial would occur within a fixed an reasonably brief period of time. The Ninth Circuit decision in Baby Tam & Co. v. City of Las Vegas, supra, was filed on September 10, 1998, one month after the revocation proceedings were initiated in this case.

After the second federal lawsuit had been pending for over one year, the City filed a motion to dismiss asserting that the first lawsuit had constituted a facial challenge to the entire City's Chapter 18.89. The City alternatively argued that even if the first federal lawsuit were construed as having constituted a facial challenge only to three specific ordinance provisions, res judicata would apply none the less on the theory that the claims made in the second federal lawsuit

could have been raised in the first lawsuit even if they were not.

The federal district court judge to whom the second case was assigned, Alicemarie Stotler, agreed with Petitioner that the first lawsuit was a facial challenge only to three distinct subsections of the Anaheim chapter dealing with adult businesses. However, Judge Stotler dismissed the remaining constitutional challenges on the theory that they could have been brought in the first lawsuit even if they were not in fact brought in that first lawsuit. On August 6, 2001 the district court dismissed Petitioner's lawsuit. Petitioner filed a timely Notice of Appeal on September 4, 2001.

On January 30, 2003 the Ninth Circuit handed down its unpublished Memorandum Decision which affirmed the district court but for opposite reasons than those upon which the district court relied. Specifically, the Ninth Circuit expressly declined to address the district court's novel theory that the bringing of a facial constitutional challenge to one portion of a multi-page ordinance permanently precludes one from bringing facial constitutional challenges to other sections of that same ordinance. The Ninth Circuit agreed with the City's original contention, which was not accepted by the district court, that Petitioner should be bound by the unfortunately broad language of the complaint in the first federal lawsuit.

On April 3, 2003 the Ninth Circuit denied Petitioner's timely Petition for Rehearing.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THIS COURT'S DECISIONS IN MONTANA v UNITED STATES, 440 U.S. 147 (1979) AND FEDERATED DEPARTMENT STORES, INC. v. MOITIE, 452 U.S. 394 (1981) AS TO WHETHER A CHANGE IN APPLICABLE CONSTITUTIONAL CASE LAW CONSTITUTES AN EXCEPTION TO THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL

In 1979 this Court decided Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979). In the case a Government contractor, at the direction of the United States, filed a lawsuit in a Montana state court attacking the constitutionality of Montana's imposition of a one percent gross receipts tax upon contractors of public, but not private, construction projects. After the Montana Supreme Court upheld the tax, and at the Solicitor General's direction, the contractor abandoned its request for review by this United States Supreme Court. Thereafter, in another lawsuit challenging the constitutionality of the tax, also financed and directed by the government, a three judge federal district court ruled that the United States Government was not bound by the Montana Supreme Court's decision and that the tax violated the supremacy clause. On appeal to this Court, this Court held that the prior judgment by the Montana Supreme Court upholding the tax precluded the United States Government from contesting its constitutionality.

In his opinion for the Court, Justice Marshall noted that there could be an exception to the general principle of estoppel. Justice Marshall, speaking for the Court, stated,

> "The sole remaining question is whether the particular circumstances of this case justify an exception to the general principles of estoppel. . . . [W]hen issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate . . . This exception is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an on going interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical. . . ."

Then Associate Justice Rehnquist filed a short concurring opinion:

> " I join the Court's opinion on the customary understanding that its references to law review articles and drafts or finally adopted versions of the Restatement of Judgments are not intended to bind the court to the views expressed therein on issues not presented by the facts of this case."

See Montana v. United States, supra, 440 U.S. at 164, 99 S.Ct. at 979.

Justice White filed a dissenting opinion.

Two years later Federated Department Stores, Inc.v Moitie, 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981) came before this Court. Then Associate Justice Rehnquist delivered the opinion for the Court. The case did not involve a constitutional law question. Rather, the case involved anti trust litigation. This Court departed from its prior precedent and concluded that there was no exception to res judicata merely because of a change in the controlling appellate case law. However, this Court's opinion in the Moitie case did not involve a change in constitutional case law, but merely in the case law interpreting the meaning of a federal statute. The case did not involve any deprivations of fundamental constitutional rights and accordingly did not include of the requisite constitutional analysis which should precede some momentous a determination as to whether the judge - made doctrine of res judicata can deprive persons of the benefits of fundamental rights conferred by the United States Constitution. In contrast this Court addressed precisely this issue in the related context of collateral estoppel and concluded that changes in the applicable constitutional case law do constitute an exception to the judge made doctrine of collateral estoppel. See Montana v. United States, 440 U.S. 147, 162-163 (1979).

Certiorari should be granted so that this Court can decide whether the exception set forth in Montana v. United States has survived Federated Department Stores, Inc. v. Moitie.

This is a case that justifies review by this Court. The question is whether or not one may lose a fundamental constitutional right to challenge an invalid ordinance because there was not a legally sufficient reason to challenge the provisions in a prior lawsuit. More importantly, this case involves the question of whether or not parties adversely affected by unconstitutional ordinances may seek to relitigate

the constitutionality of those ordinances after there has been a significant change in controlling appellate constitutional case law in the applicable jurisdiction. In this particular case the Ninth Circuit's decision in Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) was the significant change in the Ninth Circuit law. The Ninth Circuit below relied upon this Court's decision in Federated Department Stores, Inc. v. Moitie, supra, for the proposition that an intervening change of law does not alter the judgment's preclusive effect.

The Ninth Circuit stated that Petitioner had standing to challenge the permit revocation scheme in his prior lawsuit but at the time the prior lawsuit was filed there was no revocation matter pending against him.

Probably the best example of the reversal of a constitutional holding where collateral estoppel and res judicata clearly should not apply is this Court's decision in Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 142 L.Ed.2d 599, 119 S.Ct. 636 (1999). To bring this Court's decision in the Buckley case into proper focus we must turn to an earlier decision by the California Court of Appeal in Browne v. Russell, 27 Cal.App.4th 1116; 33 Cal.Rptr. 2d 29 (1994). Browne v. Russell involved the adoption by the City of Los Angeles of an ordinance prohibiting smoking in restaurants. Pursuant to a Los Angeles City Charter provision, the tobacco industry circulated a referendum petition to have the ordinance adopted by the City Council to be reviewed by the voters of the City of Los Angeles. According to the Los Angeles City Charter, if sufficient signatures are obtained on a referendum petition with respect to a particular ordinance, that ordinance does not become effective until the electorate has the opportunity to vote on the measure. If the voters approve the measure the

ordinance becomes law. If the voters reject the ordinance in the referendum election the ordinance is defeated.

The City Clerk of the City of Los Angeles invalidated a number of signatures of persons who had apparently signed the referendum petition because the circulators of the petitions were not registered voters in the city as required by a provision of the Elections Code of the City of Los Angeles. In order for the referendum measure to qualify for the ballot a large number of signatures of registered voters in the City of Los Angeles was required.

The parties who sought to qualify the referendum petition for the ballot (basically the tobacco industry) filed a lawsuit against the City Clerk to compel the City Clerk to count the signatures notwithstanding the fact that they were contained on petitions that were circulated by non registered circulators. The trial court (Los Angeles County Superior Court) found the Los Angeles City Elections Code unconstitutional to the extent that it required the petitions to be circulated by registered voters. The trial court ordered the City Clerk to count the signatures. The City Clerk obeyed the trial court order and determined that the additional signatures that had previously been disqualified resulted in the measure qualifying for the ballot.

Both the City Clerk as well as certain interveners who opposed smoking in public places and who supported the ordinance and opposed the referendum appealed the trial court's decision ordering the clerk to count the signatures, which would have resulted in the measure being placed upon the ballot for the electorate to decide. The California Court of Appeal granted an emergency writ of supersedeas blocking the order of the trial court pending the outcome of the appeal. After the parties fully briefed the issues before the State Court

of Appeal and just a week before oral argument, the Governor of the State of California signed into law a statewide measure prohibiting smoking in restaurants throughout the state. Essentially this newly adopted state law mooted the issue because it no longer mattered whether the City of Los Angeles was banning smoking in restaurants since the State of California was doing likewise throughout the entire state. Therefore it became irrelevant whether the voters of the City of Los Angeles approved or disapproved of the ordinance prohibiting smoking in restaurants. The parties filed a joint stipulation to dismiss the appeal on the ground the appeal was moot as was the referendum. The stipulation provided that the City Clerk as well as the tobacco industry proponents of the measure had no further interest in pursuing the referendum or seeking to have the City Clerk certify the Petition. In other words, the tobacco industry referendum proponents had no more interest in pursuing the case.

Notwithstanding this fact the Court of Appeal decided to go ahead and resolve the issue on the merits. That is, the Court of Appeal stated that because the matter was of public interest the Court of Appeal wanted to decide whether or not the trial court was correct in invalidating the provision of the Municipal Code that required the circulators of the petition to be registered voters. The Court of Appeal reversed the trial court and concluded that the Elections Code provision was constitutional. The Court of Appeal was of the opinion that the First Amendment was not violated by a Los Angeles Municipal Code provision that prohibited non registered voters from circulating referendum petitions. Naturally, since the case had been rendered moot no petition for review was filed with the California Supreme Court and no one sought review in this Court.

About four and a half years later the same issue came before this Court in Buckley v. American Constitutional Law Foundation, supra. This Court ruled in the Buckley case that a Colorado statute which prohibited non registered voters from circulating an initiative petition in Colorado was unconstitutional in violation of the First Amendment. It is absolutely clear that under this Court's decision in Buckley v. American Constitutional Law Foundation, supra, that the California Court of Appeal's decision in Browne v. Russell, supra, is simply not good law.

However, if the decision of the Ninth Circuit below is correct and if the decision of this Court in Federated Department Stores, Inc., v. Moitie, has eliminated the exception that this Court recognized in Montana v. United States, supra, then the tobacco industry in California is forever barred from circulating initiative or referendum petitions by non registered voters. Clearly in the City of Los Angeles the tobacco industry would be barred from seeking to relitigate the issue which it lost in Browne v. Russell, supra. Indeed, the tobacco industry no longer had any motivation to pursue the case in Browne v. Russell because the issue had been rendered moot but the Court of Appeal went ahead and decided the issue any way. Would this Court declare that the doctrines of res judicata and collateral estoppel perpetually bar the tobacco industry from relitigating the issue of whether non registered voters can circulate petitions?

This issue is worthy of review by this Court. Otherwise this Court's decision in Federated Department Stores, Inc. v. Moitie, will continue to be used by lower courts to bar First Amendment challenges to local ordinances.

Clearly in California Buckley v. American Constitutional Law Foundation, supra, overruled Browne v. Russell

although the case was not cited in the Buckley opinion because the Browne v. Russell case was a California Court of Appeal decision and was not directly related to the Colorado initiative petition process. However, obviously this Court's decisions have great impacts and what better case exists than this one to allow this Court to declare that there is still a constitutional exception to the res judicata and collateral estoppel doctrines for First Amendment litigation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Honorable Court to grant the Petition for Writ of Certiorari and reverse the judgment below.

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56606
D.C. No. CV-99-00605-AHS

[Filed April 3, 2003]

VASKEN TATARIAN,
Plaintiff-counter-defendant-Appellant,

v.

WILLIAM G. SWEENEY; VICTOR J. KALETA, in his official capacity,
Defendants-Appellees,

CITY OF ANAHEIM,
Defendant-counter-claimant-Appellee.

Before **FRIEDMAN***, **KOZINSKI** and **RAWLINSON**, Circuit Judges.

* Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

ORDER

The petition for rehearing and rehearing en banc is DENIED. Fed. R. App. P. 35, 40.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56606

[Filed January 30, 2003]

VASKEN TATARIAN,
Plaintiff-counter-defendant-Appellant,

v.

WILLIAM G. SWEENEY; VICTOR J. KALETA, in his official capacity,
Defendants-Appellees,

CITY OF ANAHEIM,
Defendant-counter-claimant-Appellee.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-99-00605-AHS
Alicemarie H. Stotler, District Judge, Presiding

MEMORANDUM*

Before FRIEDMAN**, KOZINSKI and RAWLINSON, Circuit Judges.

We do not reach Tatarian's argument that res judicata does not preclude successive facial challenges to different provisions of a single ordinance, because his first suit by its terms challenged the entire ordinance. His complaint alleged that "Ordinance No. 18.89 [sic], enacted by the City of Anaheim on October 5, 1993, and/ or the specific provisions outlined hereinabove are invalid and void," and sought "a declaration as to whether or not Ordinance No. 18.89 is constitutionally valid or invalid." Compl. P 12 (emphasis added). The district court construed the suit as "challenging the City of Anaheim's conditional use permit ("CUP") ordinance, codified as Title 18, Chapter 18.89 ... of the Anaheim Municipal Code." Order at 1. Tatarian's failure to support his claim with legal arguments pertinent to most of the ordinance's provisions does not alter the scope of his claim. Even if he is correct that his prior counsel "chose unfortunately loose and overbroad language," Reply Br. at 14, Tatarian is bound. Because Tatarian's current suit raises claims he brought in his first suit, it is barred by res judicata. *See In re Jenson*, 980 F.2d 1254, 1256(9th Cir. 1992).

Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097(9th Cir. 1998), does not change this result. Intervening changes

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

of law generally do not alter a judgment's claim preclusive effect. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2424(1981). District courts retain equitable authority to modify their own injunctions under Rule 60(b), *see Clifton v. Attorney Gen. of Cal.*, 997 F.2d 660, 662-63(9th Cir. 1993), and issue preclusion on a point of law may not survive a change in that law, *see Montana v. United States*, 440 U.S. 147, 162-63, 59 L. Ed. 2d 210, 99 S. Ct. 970(1979), but neither principle applies here.

Tatarian had standing to challenge the permit revocation scheme in his prior suit. The city had alleged numerous violations of the "no-touch" rule and thus had grounds to seek to revoke his license. The absence of a final determination of guilt is irrelevant because subsection .0206 requires only a violation, not a conviction. Revocation was not so speculative a prospect that he lacked standing. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233-36, 107 L. Ed. 2d 603, 110 S. Ct. 596(1990). Finally, *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746(1971), might have barred a challenge to the no-touch rule, but that rule is not at issue on appeal.

Tatarian's mandamus claim seeks only a new remedy to vindicate the same cause of action, and is therefore barred. *See McClain v. Apodaca*, 793 F.2d 1031, 1034(9th Cir. 1986). Tatarian waived his argument that he lacked standing to challenge the permit requirement under *Clark v. City of Lakewood*, 259 F.3d 996(9th Cir. 2001), because he raised it for the first time in his reply brief. *See United States v. Alexander*, 287 F.3d 811, 817 n.2(9th Cir. 2002). Tatarian

concedes that his grandfather rights claim is moot if his other claims fail.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

NO. SA CV 99-60SAHS (Eex)

[Filed August 2, 2001]

VASKEN TATARIAN,
Plaintiff,

v.

CITY OF ANAHEIM,
Defendant

VASKEN TATARIAN,
Petitioner,

v.

CITY OF ANAHEIM, WILLIAM G. SWEENEY, in his official capacity only as License Collector of the City of Anaheim, and VICTOR J. KALETA, in his official capacity only as Hearing Officer designated under A.M.C. S. 18.89.080.040,
Respondents.

JUDGMENT

On April 17, 2000, this Court granted partial summary judgment in favor of the Defendant/Respondents on plaintiff's claims 1, 3, 6, 14, and a portion of its claim 15, in plaintiff's first amended complaint, all based upon the doctrine of res judicata;

On December 6, 2001, this Court dismissed the Sixteenth Cause of Action in plaintiff's second amended complaint on the basis of res judicata.

On March 21, 2001, this Court dismissed claims 1, 3, 6, 14 and portions of 15 as re-asserted in plaintiff's second amended complaint, again, all on the basis of res judicata.

On March 21, 2001, this Court also dismissed claims 2 and 7 as re-asserted in plaintiff's second amended complaint.

On July 13, 2001, the Court signed and filed an order dismissing without prejudice all of the remaining claims in this case.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits and that Defendant/Respondents City of Anaheim, William G. Sweeney and Victor J. Kaleta recover their costs.

Dated: August 1, 2001 /s/_____
Hon. Alicemarie H. Stotler
U.S. District Court Judge

Supreme Court, U.S.
FILED
AUG 1 2003
OFFICE OF THE CLERK

No. 03-27

In The Supreme Court of the United States

VASKEN TATARIAN,

Petitioner,

vs.

CITY OF ANAHEIM and WILLIAM G. SWEENEY, in his official capacity only as License Collector of the City of Anaheim, and VICTOR J. KALETA, in his official capacity only as Hearing Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the holding of this Court in *Montana v. United States*, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979), that the doctrines of *res judicata* and collateral estoppel bar subsequent litigation involving the same issues, apply to constitutional challenges based upon the First Amendment to a City's Municipal Code?

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SUMMARY OF ARGUMENT

In a rather ordinary application of *res judicata*, both the District Court and the Ninth Circuit found Petitioner was barred from raising different legal theories in support of his second attempt to litigate his facial First Amendment challenges to the City of Anaheim's Sex-Oriented Business Ordinance. As this application of *res judicata* was proper, the petition must be denied.

Starting in 1996, the City of Anaheim warned Petitioner Vasken Tatarian ("Petitioner") that it would be forced to revoke his strip club's permit unless he stopped the repeated violations of the City's Sex-Oriented Business ("SOB") regulations' prohibition against patron/entertainer physical, sexual contact occurring at his club. Faced with potential revocation of his permit, Petitioner sued the City, in part claiming that his First Amendment right to provide SOB entertainment was being facially violated by the City's SOB regulations. (*Vasken Tatarian v. City of Anaheim* SA-CV 96-0280 GLT (EEx) ("*Tatarian, I*"). In *Tatarian I*, Petitioner's complaint asked the District Court to issue injunctive and declaratory relief finding that "Ordinance 18.89 [City's SOB regulations] is constitutionally invalid and should be invalid and unenforceable under the United States Constitution." Rejecting Petitioner's constitutional challenges in toto, the District Court entered judgment against him and for the City on November 17, 1997.

Petitioner's permit was subsequently revoked because he failed to correct the violations which gave rise to *Tatarian I*. In response, Petitioner again sued the City. In the present case ("*Tatarian II*"), Petitioner again argues that his First Amendment right to present SOB entertainment is

being facially violated by the City's SOB ordinance. This time, however, Petitioner has raised different legal theories to support his facial First Amendment claim. In a thoroughly unremarkable application of the *res judicata* doctrine, both the District Court and the Ninth Circuit found that Petitioner's second bite at the apple is barred because he could and should have raised in *Tatarian I* the legal theories he now raises in *Tatarian II* in support of his renewed facial First Amendment challenge. Petitioner subsequently filed his petition seeking to have this Court rewrite the *res judicata* doctrine to allow disappointed litigants to bring successive lawsuits on the same constitutional claim so long as they can create new supporting legal theories.

Petitioner thus asks this Court to announce a new exception to the law of *res judicata*. On May 5, 2003, the Ninth Circuit held that there is no such exception, nor should there be one. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 556 (9th Cir. 2003).

STATEMENT OF THE CASE

A. Tatarian I

Chapter 18.89 of the Anaheim Municipal Code ("AMC") was first enacted in its current iteration by Ordinance No. 5399 on October 5, 1993.

On September 29, 1994, the City issued Petitioner a Sex Oriented Business permit to operate the Flamingo Theater, an adult nude theater.

On March 21, 1996, Tatarian filed a complaint captioned *Vasken Tatarian v. City of Anaheim*, Case No. SA-CV-96-280

GLT (EEx) (*"Tatarian I"*). In that complaint, Tatarian challenged the constitutionality of Anaheim Municipal Code Chapter 18.89, both facially and as applied, alleging that Chapter 18.89 violated his First, Fourth, and Fourteenth Amendment rights.

On November 3, 1997, the Honorable Gary Taylor issued an Order granting the City's Motion for Summary Judgment rejecting all of Tatarian's Constitutional attacks on Chapter 18.89. Petitioner did NOT appeal this ruling.

B. Revocation Hearings

Petitioner's violations of the City's SOB Ordinance started in 1996 when "entertainers" for the Flamingo Theater, violated the prohibition against patron/entertainer sexual physical contact.

On August 13, 1998 a letter was sent from the City License Collector to Petitioner re Revocation of his Sex-Oriented Business Permit at 618 E. Ball Road in Anaheim due to these violations.

On January 14, 1999, Hearing Officer Victor J. Kaleta issued his Findings of Fact and Decisions on the Revocation and on the Denial of Renewal of the Sex-Oriented Business permit of the Flamingo Theater. The Hearing Officer issued a thorough, single spaced, 25-page decision chronicling the overwhelming evidence supporting his finding that Petitioner's regular and substantial violations of the City's Sex-Oriented Business ordinance required revocation and nonrenewal of his permit. The Hearing Officer listed the specific violations of the prohibition against patron/entertainer sexual physical contact that

occurred at the strip club in the applicable 12 month period.

C. Tatarian II

On April 13, 1999, Petitioner filed his complaint against the City of Anaheim in this case.

After numerous law and motion matters, on April 28, 2000, the City filed a Motion for Partial Summary Judgment on the grounds that Petitioner's First Amended Complaint is barred by the doctrine of *res judicata* from claiming that Chapter 18.89 of the Anaheim Municipal Code is facially unconstitutional and that the City is entitled to partial summary judgment as a matter of law on numerous claims for relief because a judgment was rendered against Petitioner on his constitutional challenges to Chapter 18.89 by the District Court in *Tatarian I*.

On August 17, 2000, the District Court issued its well reasoned Order granting the City's Motion for Partial Summary Judgment as to numerous claims. The District Court followed *ILGO v. Giuliani*, 143 F.3d 643, 646 (2nd Cir. 1998) which held that for purposes of *res judicata* analysis, a a statute's facial unconstitutionality under the First Amendment presents a single, unitary cause of action.

On July 23, 2001, the District Court filed a Stipulation and Order Dismissing all Remaining Claims. Judgment was entered on August 6, 2001. On September 4, 2001, Tatarian timely filed a Notice of Appeal. On January 30, 2003, the Ninth Circuit affirmed.

STATEMENT OF THE FACTS

On October 5, 1993, the City adopted Ordinance No. 5399, enacting a new SOB zoning ordinance for the City as Chapter 18.89.

On September 29, 1994, and pursuant to Chapter 18.89, the City granted Petitioner's application to operate a live, nude, SOB known as the "Flamingo Theater." Soon afterward, the City discovered that Petitioner was violating several provisions of both Chapter 18.89 and his permit.

Aside from violating a whole host of other laws, Petitioner's conduct violated AMC §18.89.030.050.0520.05 that states:

> "No entertainer shall have physical contact with any patron, and no patron shall have physical contact with any entertainer, while on the premises [of the SOB], which physical contact involves the touching of the clothed or unclothed genitals, pubic area, buttocks, cleft of the buttocks, perineum, anal region, or the female breast with any part or area of such other person's body."

Due to Petitioner's violations of Chapter 18.89, the City informed Petitioner that unless the violations were stopped, the City would revoke and/or not renew his permit.

Apprehensive about the City either refusing to renew his permit and/or revoking his permit, on March 21, 1996, Petitioner filed *Tatarian I* against the City seeking to invalidate ***all*** of Chapter 18.89. In *Tatarian I*, as in this case, Petitioner argued that his First Amendment right to present SOB entertainment was being facially violated by Chapter 18.89.

On November 4, 1997, the Honorable Gary L. Taylor entered his Order granting summary judgment for the City and upholding Chapter 18.89 as constitutional. The District Court entered Judgment for the City on November 17, 1997. Petitioner did NOT appeal.

Between July of 1997 and 1998, police officers inspected Petitioner's establishment. Each time the police were present, save one occasion, they observed violations of Chapter 18.89. For instance, the police observed at least eleven (11) incidents of Petitioner's nude entertainers having "physical contact" with Petitioner's patrons. Notably, these were the same violations which caused the City to warn of revocation of Petitioner's permit under AMC §18.89.080.020 and which gave rise to his facial First Amendment challenge in *Tatarian I*. Several incidents were videotaped.

Having failed to correct the code violations, the Petitioner's pre-*Tatarian I* fears materialized, i.e., the City commenced the revocation and non-renewal of his permit. Two days of hearings were held on the revocation. On January 14, 1999, after considering the substantial evidence introduced during the hearings, and the briefs both parties subsequently filed, the hearing officer issued a thorough, 25-page decision finding that overwhelming evidence supported the decision to revoke and not renew Petitioner's permit.

Obviously dissatisfied with this outcome, Petitioner, on April 13, 1999, commenced *Tatarian II* by filing his complaint. Variously denominated as requests for issuance of writs of mandate, requests for declaratory relief, and requests for injunctive relief, most of Petitioner's claims

again consisted of facial First Amendment challenges to the constitutionality of Chapter 18.89.

Petitioner chose to split his facial First Amendment claim between *Tatarian I* and *II*. For this reason, on April 28, 2000, the City filed a Motion For Partial Summary Judgment demonstrating that *res judicata* barred Petitioner from litigating those legal theories he could and should have raised in *Tatarian I*. On August 17, 2000, the District Court issued an Order granting the City's Motion For Partial Summary Judgment on several "causes of action". The District Court followed *ILGO v. Giuliani*, 143 F.3d 643, 646 (2nd Cir. 1998) which held that for purposes of *res judicata* analysis, a statute's facial unconstitutionality under the First Amendment presents a single, unitary cause of action. The Ninth Circuit affirmed this ruling.

This Petition must be denied because Petitioner has not established that an exception should be created to the application of *res judicata* in this case.

ARGUMENT

THIS COURT SHOULD REJECT THE PETITION BECAUSE THE COURT CORRECTLY CONCLUDED THAT *RES JUDICATA* IMPOSED UPON PETITIONER AN OBLIGATION TO RAISE IN *TATARIAN I* ALL LEGAL THEORIES HE COULD HAVE RAISED IN SUPPORT OF HIS CLAIM THAT HIS FIRST AMENDMENT RIGHT TO PRESENT SOB ENTERTAINMENT AT HIS BUSINESS WAS BEING FACIALLY VIOLATED BY CHAPTER 18.89.

Given that the Ninth Circuit's opinion represents an ordinary, textbook application of *res judicata*, granting the Petition is hardly appropriate. It is clear that the "rights" established in *Tatarian I* would be destroyed or impaired by Petitioner's prosecution of those legal theories the Court determined *res judicata* barred in *Tatarian II*. In *Tatarian I*, Petitioner alleged that his First Amendment right to present SOB entertainment was being facially violated by the City's SOB ordinance. The Order and Judgment entered in favor of the City in *Tatarian I* concluded that Chapter 18.89 *did not* facially violated Petitioner's First Amendment rights. This conclusion would be greatly impaired by the prosecution of barred legal theories in *Tatarian II*. No longer could the City rely on the *Tatarian I* court's conclusion that the SOB regulations being applied to Petitioner's business did not facially violate his First Amendment right to present SOB entertainment. By prevailing in *Tatarian I*, the City established its right to continue to regulate Petitioner's business with the regulations applicable to him during *Tatarian I*. Such a right would be impaired if in this case, Petitioner were again allowed to claim that other previously applicable provisions of the regulations facially violate his First

Amendment right to present SOB entertainment. Such a result would run afoul of the primary policy supporting *res judicata* articulated by this Court:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 402, 69 L.Ed.2d 103, 101 S.Ct. 2424, 2429 (1981).

Petitioner's belated attempt to narrow the "rights" determined by *Tatarian I* to only three issues must be rejected. It was, after all, Petitioner that filed the Complaint in *Tatarian I*.

This case is substantially similar to *ILGO v. Giulani*, 143 F.3d 638 (2nd Cir. 1998). There, the Court of Appeal dismissed that portion of plaintiff ILGO's second federal lawsuit claiming that New York City's parade permit requirements facially violated its First Amendment rights. The court concluded that *res judicata* barred ILGO from litigating its facial First Amendment challenge to the parade permit requirement because it raised and lost that claim in its prior suit.

In *ILGO*, the court concluded that the two lawsuits did involve the same "claim": they both argued the same regulatory scheme facially violates the plaintiff's First Amendment right to participate in the parade. *Id.* at 644. Moreover, *ILGO* is also particularly relevant here because the court concluded the addition of new legal arguments to support the claim in the second suit will not stave off *res judicata*. *Id.* at 646 ["To the extent that any aspect of ILGO's facial challenge brought in 1996 differs from that

which it raised in 1995, the District Court correctly held that the claims are barred by the doctrine of *res judicata* because they could have been raised in the earlier proceeding."] *ILGO* has been recently followed. "*[R]es judicata* can act as a bar to virtually any sort of claim, including constitutional challenges to the facial validity of municipal regulations." *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 290 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035, 121 S.Ct. 623 (2000).

Here, Petitioner's facial First Amendment challenge to Chapter 18.89 is barred for the same reason the plaintiffs' facial First Amendment challenge to the permit ordinance was barred in *ILGO*.

Petitioner, however, fails to provide any relevant authority for the proposition that this Court should ignore the application of *res judicata* simply because it results in him being barred from raising different legal theories to support the facial constitutional challenge he raised in an earlier lawsuit. In fact, this Court has unequivocally rejected such an "equitable exception" to *res judicata*. In *Federated Dept. Stores Inc. v. Moitie*, supra, this Court explained that even the interests of individual justice in a particular case do not warrant crafting exception to long standing doctrine of *res judicata*. Citing *Reed v. Allen*, 286 U.S. 191, 52 S.Ct. 532, 76 L.Ed. 1054 (1932) this Court stated:

> "The predicament in which respondent finds himself is of his own making . . . [W]e cannot be expected, for his sole relief, to upset the general and well established doctrine of *res judicata*, conceived in the light of the maxim that the interests of the state requires that there be an end to litigation . . . a maxim which comports with

> common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." *Federated Dept. Stores Inc. v. Moitie*, supra, 452 U.S. at 401-402.

Moreover, Petitioner's argument appears to presume that the application of *res judicata* to him has some undisclosed conclusive effect on the public regarding the constitutionality of the challenged ordinance. Petitioner's argument, however, ignores the fact the *res judicata* only bars parties and their privies. Any other member of the public having standing to facially challenge the First Amendment implications of Chapter 18.89 is presumably free to do so. Accordingly, the public is not deprived of the opportunity to right a constitutional wrong should one exist. *ILGO*, supra, 143 F3d 638, 647.

This Court most recently addressed the proper scope of the *Montana v. United States*, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979), "exception" in *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984), which involved successive actions brought by the EPA against Stauffer in response to the company's refusal to submit to inspections by private contractors hired by the EPA. This Court expressed serious doubt regarding the proper scope of the exception:

> "While our discussion in *Montana* indicates that the exception is generally recognized, we are frank to admit uncertainty as to its application. The exception seems to require a determination as to whether an 'issue of fact' or an 'issue of law' is sought to be relitigated and then a determination as to whether the 'issue of law' arises in a

> successive case that is so unrelated to the prior case that relitigation of the issue is warranted. Yet we agree that, for the purpose of determining when to apply an estoppel, when the claims in two separate actions between the same parties are the same or are closely related it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law.'" *Id.* at 171, 104 S.Ct. at 579 (internal quotation marks and citations omitted).

Petitioner asks this Court to announce a new exception to *res judicata* when the claim involves a statute's unconstitutionality. On May 5, 2003, the Ninth Circuit held that there is no such exception, nor should there be one. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 556 (9th Cir. 2003). The City's SOB Ordinance is not immunized from constitutional scrutiny; claim preclusion does not bar this claim from being raised by a non-party to *Tatarian I*. As far as the justice or the public policy of denying Petitioner his claim, this Court has emphasized, "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." *Federated Dep't Stores, Inc. v. Moitie*, supra, 452 U.S. at 401 (citation omitted).

The Ninth Circuit's ruling is a rather mundane application of *res judicata* principles. Simply stated, the Ninth Circuit's ruling only bars Petitioner from asserting new legal theories in *Tatarian II* which he could have argued in *Tatarian I* in support of his claim that his First

Amendment right to provide SOB entertainment was being facially violated by the City's SOB regulations.

CONCLUSION

Petitioner made allegations that his First Amendment right to provide sexually oriented entertainment at his business was being facially violated by the City's Sex-Oriented Business regulations in his *Tatarian I* complaint. Accordingly, in his prayer for relief, Petitioner requested the District Court to issue injunctive and declaratory relief finding that "Ordinance 18.89 is constitutionally invalid and should be invalid and unenforceable under the United States Constitution."

There can be no doubt that in both *Tatarian I* and *Tatarian II* Petitioner raised the same facial First Amendment Claim: That Petitioner's First Amendment right to present sexually oriented entertainment at his business was facially violated by the City's Sex-Oriented Business regulations.

In this case the Ninth Circuit found Petitioner was barred from raising different legal theories in support of his second attempt to litigate his facial challenge. As this application of *res judicata* by the Ninth Circuit was proper, this Petition must be denied.

Petitioner asks this Court to announce a new exception to *res judicata*. On May 5, 2003, the Ninth Circuit held that there is no such exception, nor should there be one. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548,

556 (9th Cir. 2003). One should not be created now. To do so would open a floodgate of litigation for the courts.

DATED: August 1, 2003

Respectfully submitted,

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